**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| Ancillary or Supplementary Use of | ) | MM Docket No. 98-203 |
| Digital Television Capacity by Noncommercial | ) | |
| Licensees | ) | |

TO: The Commission

# REPLY COMMENTS OF THE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS

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**REPLY COMMENTS OF**
**THE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS**

The Association of America's Public Television Stations ("APTS") submits these reply comments in the above-captioned proceeding, relating to the permissible ancillary and supplementary services to be offered by public television stations on their excess digital capacity.

## I. INTRODUCTION

In its opening comments, APTS explained that (1) allowing public television stations to offer ancillary or supplementary services for remuneration on their excess digital spectrum is clearly in the public interest because it will provide stations with additional revenue to support their mission-related activities; (2) public television stations should have substantial flexibility in the provision of ancillary or supplementary services on their excess digital spectrum, so long as the digital channel is used primarily to provide a noncommercial educational service and the services do not interfere with the provision of public telecommunications services; and (3) the Commission should

exempt public television licensees from any obligation to pay fees in connection with offering ancillary or supplementary services when revenues from these services are used to support a station's mission-related activities, as APTS and the Public Broadcasting Service ("PBS") had argued in MM Docket No. 97-247.

Only four other initial comments were filed. All of these commenters support either allowing public television stations to offer ancillary or supplementary services for remuneration or granting the requested fee exemption.

One set of comments, filed by Media Access Project on behalf of various clients ("UCC, et al."), is generally supportive of APTS' position, but takes issue with both the Commission and APTS on a narrow point involving advertiser-supported services.[1] As shown below, the arguments presented by UCC, et al. on this point are without merit and should be rejected. There is no reason at this time to impose the sorts of restrictions UCC, et al. advocate. Instead, consistent with APTS' initial comments, the Commission should provide public television stations with flexibility to offer a range of ancillary or supplementary services on their excess digital spectrum, so long as the digital channel is used primarily to provide a noncommercial educational service. In addition, the Commission should exempt public television stations from fees on revenues from all such services that are used to support the stations' mission-related activities, without distinguishing advertiser-supported services from other types of services.

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1 Comments of UCC, et al., filed Feb. 16, 1999 ("UCC, et al. Comments").

## II. DISCUSSION

### A. The UCC, et al. Comments Support the Conclusion That Public Television Licensees Should Be Authorized to Offer Ancillary or Supplementary Services on Their Excess Digital Spectrum.

The initial comments filed by other parties agree with the Commission's tentative conclusion and APTS' opening comments that public television stations should be authorized to provide ancillary or supplementary services for remuneration on their excess digital spectrum. UCC, et al. properly note that the public television system "has been perpetually underfunded."[2] Because UCC, et al. "support the continuation of a strong system of noncommercial educational broadcasting," they generally support the Commission's conclusion that public television stations should be able to offer "remunerative" ancillary or supplementary services.[3]

UCC, et al. highlight the primary reason why it is in the pubic interest to permit public television stations to offer ancillary or supplementary services. As noted in APTS' initial comments, public television stations have limited sources of funding. UCC, et al. point out that Congress's failure to create a permanent funding source for public television has led to continuing financial uncertainty for stations. Revenue earned from ancillary or supplementary services offered on excess digital spectrum can help put stations on a more solid financial footing, allowing them to preserve and enhance the services they offer as part of their educational and public service mission. This sort of

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2 *Id.* at 4.

3 *Id.*

financial support can help to preserve the strong system of noncommercial educational broadcasting that UCC, et al. want to see in the future.

### B. There Is No Basis for Restricting Public Television Stations' Ability to Offer Advertiser-Supported Ancillary or Supplementary Services.

The bulk of the comments provided by UCC, et al. are devoted to the argument that the Commission should bar public television stations from offering certain ancillary or supplementary services. UCC, et al. apparently believe it is appropriate for public television stations to earn revenue through offering subscription services, leasing excess capacity to third parties, and perhaps other types of services. But they insist that public television stations may not offer any service that is advertiser-supported, on the ground that this would violate Section 399B of the Communications Act and would harm public television. These arguments are incorrect.

Even if they were correct in their assumption that Section 399B applies to the digital spectrum (and APTS believes they are not), UCC, et al. are plainly wrong in arguing that public television stations may not offer advertiser-supported services that are non-broadcast in nature. Section 399B bars public broadcast stations from making their facilities available "for the broadcasting of any advertisement."[4] Citing its prior rulings on the scope of the term "broadcast," the Commission in its notice of proposed rulemaking tentatively concluded that a public television station could offer, *e.g.*, an advertiser-supported subscription service.[5]

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4 47 U.S.C. § 399b(b)(2).

5 Notice ¶ 37.

UCC, et al. argue that, despite the plain language of Section 399B, non-broadcast services are included within the prohibition. They point to the definition of "advertisement" as material that is "broadcast or otherwise transmitted" in exchange for remuneration.[6] But it is the language of the prohibition that is relevant. The definition cited by UCC, et al. shows that Congress was aware of a distinction between advertisements that are broadcast and advertisements that are "otherwise transmitted." Yet in the words containing the description of what public television stations may not do, Congress referred only to "broadcasting" of an advertisement, not to "broadcasting or other transmission" of an advertisement. Congress presumably chose its words deliberately. The contrast with the broader language of the definition confirms that the statute does not prohibit advertisements on non-broadcast services.

More broadly, as explained in its initial comments, APTS believes that the Section 399B prohibition on advertiser-supported services applies to a public television station's primary noncommercial broadcast service, not to a station's ancillary or supplementary digital services. Congress enacted Section 399B in a context in which television broadcasting was limited to analog technology. In the analog world, the primary video channel of a public television station occupies almost all of the station's available spectrum. In these circumstances, Congress was concerned that permitting public television stations to broadcast advertisements would subject their programming choices to the "influence of special interests."[7] In contrast, digital technology will allow a

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6 47 U.S.C. § 399b(a).

7 H.R. Rep. No. 97-82, 97th Cong., 1st Sess. 16 (1981).

station to offer an advertiser-supported broadcast service on its ancillary and supplementary capacity that is completely unrelated to and has no influence over the station's primary noncommercial broadcast service. It therefore should not be assumed that Congress intended the Section 399B prohibition to extend to use of excess digital capacity.[8]

UCC's argument that there is likely to be great harm to public television if stations have the flexibility to offer advertiser-supported services is unfounded and based in analog technology On a single digital channel, a station will have ample capacity on which to continue to provide its primary noncommercial educational service (which will continue to be advertiser-free), to expand that noncommercial service, and to offer additional services on an ancillary and supplementary basis. The channel-mapping protocol that will be used for digital television will allow a public television station to segregate its noncommercial services from any advertiser-supported services it may carry on its excess digital spectrum. The PSIP protocol that will be used for digital services identifies program streams without reference to a fixed channel designator. As a result, individual programming streams carried on the same digital spectrum can be identified in a way that makes it appear to the viewer that they come from entirely different sources. Thus, a public television station can completely disassociate itself

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[8] UCC, et al. argue that, other than a limited experiment in the early 1980s, Congress has declined to allow public television stations to offer advertiser-supported services. However, the congressional inaction cited by UCC, et al. occurred in the period when all television broadcasting was based on analog technology. This record says nothing about how Congress would have regarded advertiser-supported services in a digital context.

from any advertiser-supported service it may provide on its excess digital capacity such that the user of the service would not perceive any relationship between the service and the station.[9]

In sum, as discussed in our initial comments, digital technology will allow stations greater opportunity to strike the balance intended by Congress in Section 399B – to use their broadcast facilities to generate revenue, while ensuring that their primary broadcast service remains noncommercial. As long as the public television station's primary broadcast service remains noncommercial, Section 399B is satisfied. It is consistent with the intent of 399B for the Commission to determine that the 399B prohibition does not extend to digital ancillary and supplementary services – whether they be deemed "broadcast" or "non-broadcast" or advertiser-supported or not.

Moreover, UCC's threats that advertiser-supported ancillary and supplementary services will "threaten the institution" and will "ruin public broadcasting" are hyperbole and simply not true. Public television stations are committed to preserving both their noncommercial focus and their financial viability. As noted in APTS' initial comments, public television stations' decisions on whether and how to offer ancillary and supplementary services will be subject to a variety of additional checks

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[9] Even with analog technology, public television stations have been able to offer advertiser-supported ancillary services without destroying the stations' primarily noncommercial character or somehow tainting the perceptions of viewers. *See* the discussion of public television's experience with advertiser-supported services on excess Vertical Blanking Interval capacity and in connection with Instructional Television Fixed Service at page 25 of APTS' initial comments in this proceeding. This experience provides assurance that advertising provided in connection with ancillary services in the digital context will not create negative perceptions of public television.

and balances including local governing boards, the need to preserve viewer and government support, and stations' nonprofit educational mission upon which their tax exempt status is based. In short, separate and entirely distinct advertiser-supported ancillary and supplementary services will support, not jeopardize the educational services stations provide.

In sum, UCC, et al. misread the relevant statutory language and raise policy concerns that are not grounded in fact. Their arguments do not undermine the conclusion that public television stations should have broad flexibility to offer ancillary or supplementary services. Under existing requirements, the digital channel must be used primarily to provide a noncommercial educational service, and any ancillary services may not interfere with the provision of public telecommunications services. At least for the time being, the Commission should refrain from imposing any additional restrictions.

### C. Public Television Licensees Should Be Exempt from Paying Fees on Revenues from Ancillary or Supplementary Services Used to Support Their Mission-Related Activities, Regardless of the Type of Services Offered.

As explained in the comments APTS and PBS filed in MM Docket No. 97-247,[10] public television licensees should be exempt from paying fees on revenue they earn from ancillary or supplementary services when they use that revenue to support their mission-related activities. The language of Section 336 of the Communications Act supports this conclusion. In addition, it is consistent with prior exemptions granted by

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[10] Copies of these comments were included as Attachment 4 to the initial comments APTS filed in this proceeding.

Congress and the Commission to ensure that public television stations receive the full benefit of federal funding.

UCC, et al. generally support a fee exemption for public television stations. They argue, however, that, if the Commission permits advertiser-supported services, it may not exempt those services from fees.[11] There is no basis for such an argument.

The rationale for a fee exemption does not depend on the nature of the ancillary service offered. As APTS has explained in prior filings, the provision governing fees simply does not apply to a situation in which revenues are being applied to activities in furtherance of a public television's congressionally mandated mission. In such circumstances, there is no need to "recover" anything for the public or avoid "unjust enrichment" within the meaning of Section 336 because the revenue in question is being devoted to public purposes. Moreover, where the revenues are being used to defray the costs of mission-related activities, there is no point in assessing a fee, because this would just put pressure on existing federal financial support. As Congress and the Commission have recognized in prior proceedings, assessment of a fee in these circumstances would amount to "robbing Peter to pay Paul."[12]

These principles apply, whether the services that generated the revenue are subscription services, advertiser-supported services, or any other type of services.

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11 UCC, et al. Comments, pp. 15-16.

12 *See* APTS/PBS Opening Comments in MM Docket No. 98-203, pp. 6-11.

So long as the revenue is used to support mission-related services, it would be contrary to the public interest to reduce that revenue by assessing a fee on it.

UCC, et al. argue that an advertiser-supported service is "commercial" and that it would be inappropriate to grant a fee exemption in connection with "commercial" revenue. This argument is without merit. A public television station may receive revenue in connection with either a subscription video service or an advertiser-supported data service. But one is no more "commercial" than the other from the station's perspective. Both services are used simply to generate revenue to support the station's mission-related activities. If the Commission has concluded that it is in the public interest to allow public television stations to provide both types of service, the revenue from both should be equally exempt from a fee.

## III. CONCLUSION

The record in this proceeding clearly supports the Commission's tentative conclusion that public television stations should be permitted to use their digital capacity to offer ancillary and supplementary services to generate revenue. The narrow point raised by UCC, et al. is based on a far too broad reading of section 399B. It is well within the Commission's authority to determine that the Section 399B prohibition is not applicable to ancillary and supplementary digital services provided by public television stations.

For the reasons stated above and in the initial comments of APTS, the Commission should (1) authorize public television stations to offer ancillary or supplementary services on their excess digital spectrum and should provide stations with flexibility in connection with such services, so long as the digital channel is used

primarily to provide a noncommercial educational service, and (2) exempt public television licensees from payment of fees in connection with offering ancillary or supplementary services.

Respectfully submitted,

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